No. 291.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

WILLIAM E. ISELIN, JAMES W. CROMWELL, LINCOLN CROMWELL, ARTHUR ISELIN, GEORGE A. VONDERMUHLL, OLIVER ISELIN AND KENNETH P. BUDD, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF WILLIAM ISELIN & COMPANY, *Appellants*,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF IN BEHALF OF THE APPELLANTS.

DALLAS S. TOWNSEND,
Attorney for Appellants.

(30,888)

SUBJECT INDEX.

INDEX OF AUTHORITIES.

Cases Cited.

Statutes Cited.

Texts Cited.

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APPEAL FROM THE COURT OF CLAIMS.

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Statement of the Case.

This is an appeal from a judgment of the Court of Claims, entered January 26, 1925, dismissing the petition of the Appellants in that Court upon Findings of Fact after trial (Transcript of Record, p. 13, 60 C. Cls. R. 255).

As will appear from an examination of the opinion of the Court below (Transcript of Record, at pp. 11 and 12), that Court did not consider it "necessary" in its Findings of

Fact to cover all the issues, "since the merits of the case", in the Court's view, were "to be determined upon another basis". Nevertheless, it is believed that the facts appearing in the Record sufficiently indicate the principal points of the case.

At and for some time prior to February 2, 1920, the War Department was in possession of a large quantity of airplane linen, left over from the war. It was "surplus property" (Finding II, Transcript of Record, p. 8). The Government desired to sell it and the Secretary of War was authorized by the Act of Congress of July 11, 1919, the Army Appropriation Act for the fiscal year ending June 30, 1920, to sell this property "upon such terms as may be deemed best" (41 Statutes at Large 105, U. S. Comp. Stat. 1923 Sup., Sec. 6941*c*).

The War Department advertised certain surplus property, including this linen, for sale "as is", *i. e.*, without warranty as to quality, bids to be received until 3 P. M., February 2, 1920 (Transcript of Record, pp. 4, 5, 8). Two alleged representatives of the United States exhibited samples of the linen to the Appellants, claiming to be authorized to act for the United States, and the Appellants made an offer on January 19, 1920, to one of these alleged representatives to purchase the linen, incorporating in their offer a stipulation that the quality of the linen would be in accordance with the sample shown them (Transcript of Record, p. 8). However, as the Court of Claims found (Transcript of Record, p. 8) this alleged representative had no authority to act for the United States, and, although immaterial, it is a fair inference from the Findings that the Appellants discovered this lack of authority, because on February 2, 1920, they made a new offer directly to the Government to purchase a quantity of the linen. Their offer read as follows:

> "I herewith submit my firm offer for approximately 168,400 yards 38-inch Grade A natural brown Irish Airplane Linen. Specification: Minimum threads, warp and filling, 90. Maximum threads, warp and filling, 105.

Minimum weight, 4.5 oz. per square yard. Average length of pieces from 60 to 80 yards, at 93¢ per yard, f. o. b. cars at present location. Said linen as per sample submitted; goods to be firsts.

This offer is for immediate acceptance on usual Government terms."

Transcript of Record, pp. 2, 5, 9.

It is with this offer that the present appeal is concerned. The term "Grade A" is a term of textile construction, having nothing to do with the quality of the fabric, but the term "firsts" refers to textile quality (Finding IX, Transcript of Record, p. 10).

It will be noted that this offer makes no reference to the advertisements of the linen, which the Court below found came to the Appellants' attention (Transcript of Record, p. 9), but invites acceptance on a different basis, namely, the linen to be "as per sample submitted" and "goods to be firsts". In the language of the Judge Advocate General, the Appellants' offer "departed from the terms of the advertisement and was conditioned 'goods to be firsts'" (Transcript of Record, p. 6).

The next letter in point of time given in the Findings of Fact was a letter from the War Department to the Appellants, February 10, 1920, which read as follows:

"1. This is to advise you that Washington has awarded you 150,400 yards of 38" grade 'A' Airplane Linen at 93 cents per yard. This linen is listed on sheet No. 3955 item 1—65,400 yards, and sheet No. 2879 item 6, 85,000 yards.

2. Inasmuch as we have your check for $13,987.20 to cover 10% of the sale, it is requested that you send this office Certified Check for $125,884.80 to cover the balance due together with your shipping instructions.

3. This check should be drawn in favor of 'Disbursing Officer, Air Service,' marking envelope for the attention of the Materials Disposal & Salvage Division, 360 Madison Ave., N. Y. C.

4. Attention is invited to the following rule of the Air Service, which requires that payment be made promptly and material removed within 30 days of award."

Transcript of Record, pp. 2, 6, 9.

The Appellants contend this letter was an acceptance of their offer, and the Comptroller General and Judge Advocate General so decided.

The linen had been bought by the Government as linen of "first quality" (Transcript of Record, p. 6), and the officials of the War Department no doubt believed it to be such.

It may be observed that this letter was written five days after February 5, the date on which bidders under the advertisements were to be notified of the yardage awarded them (Transcript of Record, p. 8), and also that the Appellants had then paid $13,987.20 and were requested to make an additional payment of $125,884.80 "to cover the balance due". The Court below in its opinion stated that "the award was no doubt made in response to plaintiffs' bid" (Transcript of Record, p. 11). Presumably the "balance due" of $125,884.80 was due pursuant to Appellants' letter of February 2 and the Government's letter of February 10.

It was and is the position of the Appellants that these two letters evidenced a contract. The Comptroller General and the Judge Advocate General had previously reached this conclusion (Transcript of Record, pp. 4, 7), but the Court of Claims held that this contention was a "fundamental" and "essential error" (Transcript of Record, pp. 11, 12). This question, it is submitted, is the principal issue upon this appeal.

Whatever may have been the legal position of the parties by reason of the two letters quoted, the Appellants paid for the linen in accordance with their offer, received it, and it was not of first quality. The Court of Claims did not find it "necessary to incorporate in the findings" the result of

"the various inspections which were made of the goods after being complained of by the plaintiffs as to their quality" (Transcript of Record, p. 11), but it is submitted that the defective quality of the goods clearly appears from Finding VIII, Transcript of Record, page 10, in which it "appears that the linen as a whole was not of first quality". The previous investigations of the Judge Advocate General and the Comptroller General justify a similar conclusion (Transcript of Record, pp. 4, 6).

At the time of this transaction linen known to the trade as "seconds" was worth about 25% less than "firsts" (Finding X, Transcript of Record, p. 10).

Originally the Appellants filed their claim with the War Department. The Judge Advocate General, although holding the Appellants had been damaged and were entitled to recover therefor, advised that their claim was "unliquidated in amount" and that the "administrative officers of the War Department" were therefore "without authority to entertain or adjust it" (Transcript of Record, p. 7).

The claim was then put before the Comptroller General, in accordance with the statement in the Judge Advocate General's opinion that such claims were "cognizable by the proper accounting officers of the Treasury Department or as legal actions in the Court of Claims". The Comptroller General agreed with the Judge Advocate General that the Government had not been relieved of its liability to furnish goods in accordance with the Appellants' offer and the Government's acceptance, but held that no funds were available out of which the claim could be paid.

The Appellants thereupon instituted their action in the Court of Claims, with the result hereinabove stated. The case is reported in 60 C. Cls. R., p. 255.

Specification of Errors.

1. It is submitted that the Court of Claims erred in the conclusion of law that, upon the facts found, as matter of law the Appellants were not entitled to recover (Transcript of Record, p. 11).

2. It is submitted that the Court of Claims erred in holding that the Appellants' offer of February 2, 1920, was not accepted by the War Department's letter of February 10, 1920 (Transcript of Record, pp. 11, 12).

3. It is submitted that the Court of Claims erred in holding that the offer of February 2, 1920, and the award of February 10, 1920, in reply, did not constitute a contract.

4. It is submitted that the Court of Claims erred in holding that after receipt of the letter of February 10, 1920, the Appellants were "at liberty to decline to proceed further with the transaction", when, as appears from the letter itself (Finding VI, Transcript of Record, p. 9), they had then already paid 10% of the purchase price and payment of the "balance due" amounting to $125,884.80 was demanded by the United States.

5. It is submitted that the Court of Claims erred in dismissing the Appellants' Petition and in giving judgment against them and in favor of the United States (Transcript of Record, p. 11).

ARGUMENT IN BEHALF OF APPELLANTS.

POINT I.

The letter of the Appellants of February 2, 1920, containing their offer to purchase the linen in question, and the letter of the War Department of February 10, 1920, created a contract, whereby the United States agreed to sell and the Appellants to buy linen of first quality and according to sample.

A.

The Appellants' letter of February 2, 1920, was an offer to purchase goods of designated quality.

The Appellants' letter of February 2, 1920, read as follows:

> "I herewith submit my firm offer for approximately 168,400 yards 38-inch Grade A natural brown Irish Airplane Linen. Specifications: Minimum threads, warp and filling, 90. Maximum threads, warp and filling, 105. Minimum weight 4.5 oz. per square yard. Average length of pieces from 60 to 80 yards, at 93¢ per yard, f. o. b. cars at present location. Said linen as per sample submitted; goods to be firsts.
>
> This offer is for immediate acceptance on usual Government terms."
>
> *Transcript of Record*, pp. 2, 5, 9.

There is no question that this letter was an offer to purchase on the terms stated. The Court below so treated it, but apparently meant to suggest that it had some legal connection with the previous advertisement of the goods for sale on other and different terms. The reasons for the Appellants' departure from the terms of offer invited by the

previous advertisements do not appear within the Record before this Court, but it is not suggested in the Findings or in the opinion of the Court below, or indeed anywhere in the Record, that the Appellants were not entirely within their rights in submitting a bid upon their own terms and departing from the terms invited by the advertisements mentioned by the Court. It may be inferred from the Findings that the Appellants' offer was the highest received for the goods, and in determining upon the amount of it the Appellants, it is fair to assume, kept in mind that they were bidding for goods warranted as to quality and not for unwarranted goods for the quality of which no responsibility would be undertaken by the seller.

B.

The letter of the War Department, February 10, 1920, was an acceptance of the Appellants' offer.

The first paragraph of the opinion of the Court below correctly states that "the award was no doubt made in response to plaintiffs' bid".

The Court below also said: "The form of the bid and award are material" and referred to Findings V and VI (Transcript of Record, pp. 8, 9).

The award, that is the War Department's letter of February 10, 1920 (Finding VI, Transcript of Record, p. 9), read as follows:

> "1. This is to advise you that Washington has awarded you 150,400 yards of 38" grade 'A' Airplane Linen at 93 cents per yard. This linen is listed on sheet No. 3955 item 1—65,400 yards, and sheet No. 2879 item 6, 85,000 yards.
>
> 2. Inasmuch as we have your check for $13,987.20 to cover 10% of the sale, it is requested that you send this office Certified Check for $125,884.80 to cover the balance due together with your shipping instructions.

3. This check should be drawn in favor of 'Disbursing Officer, Air Service,' marking envelope for the attention of the Materials Disposal & Salvage Division, 360 Madison Ave., N. Y. C.

4. Attention is invited to the following rule of the Air Service, which requires that payment be made promptly and material removed within 30 days of award."

Transcript of Record, pp. 2, 6, 9.

Of this letter the Court below said:

"The essential error is in assuming that there was an acceptance of plaintiff's bid. In the communication of February 10 informing the plaintiff that it had been awarded a stated number of yards of grade A airplane linen we do not find the word 'accepted' or any word of similar import used, or any reference to plaintiff's bid. This communication notified plaintiff of the award to it of a quantity of linen, which might or might not comply with the stipulation as to quality contained in plaintiff's bid, and can not by any possibility be construed as an acceptance upon the condition attempted to be imposed that the goods were to be firsts."

Transcript of Record, page 12.

An examination of the Court's opinion, taken with its Findings of Fact, clearly shows that the Court regarded the letter of February 10 from the War Department as a rejection of the Appellants' offer of February 2, or as a counter-offer.

The principal question raised by this appeal is whether the letter of February 10 can properly be so regarded.

The attention of this Court is respectfully invited to the following particulars as bearing upon the determination of this question:

1. The letter of February 10 was written five days after February 5, the date on which bidders under the advertisement were to be notified of awards to them (Finding IV, Transcript of Record, p. 8). This, it is submitted, is an

entirely immaterial consideration, but it may be considered to have some bearing on the apparent suggestion of the Court below that the letter of February 10 was in some way connected with the advertisements. Regardless of the advertisements the Appellants had the right to make any offer they pleased and the War Department could accept or reject it.

2. In the letter of February 10 the War Department stated that the linen "had been awarded" to plaintiffs. As the Court below stated in its opinion (Transcript of Record, p. 11), "the award was no doubt made in response to plaintiff's bid". If "made in response" to the Appellants' bid, how could it be made on terms other than the terms of the bid? The Transcript of Record shows no other offer from the Appellants to the United States to purchase the linen, or any part of it.

3. The letter of February 10 acknowledged receipt of $13,987.30 against the purchase price, which apparently the United States proposed to retain, and requested payment of $125,884.80, "the balance due". If a balance was due, it must have been due pursuant to a contract, and the only inquiry on this point will be, what were the terms of the *consensus ad idem?* If these terms do not appear from the only two letters between the vendor and vendee prior to payment of the purchase price and delivery of the goods where are they to be found?

In the case of *In re Goorman*, 283 Fed. 119, at 123, the Court in construing the phrase "due and payable" said:

> "This indicates a previous transfer to vendee of property for which such entire sum is so payable."

It is equally in point to observe that the letter of February 10 does not offer to return to the Appellants their payment of $13,987.30, nor does it suggest the possibility of such return.

4. The letter of February 10 requested "shipping instructions". This request is a further indication of the assumption on the part of the War Department of two contractual obligations, one on the part of the Appellants to pay the "balance due", and the other on the part of the United States to deliver the goods sold.

5. The fact that the United States, at the time the letter of February 10 was written, had received and apparently then proposed to retain the $13,987.30 paid by the Appellants should, it is submitted, be sufficient to dispose of the argument of the Court below that the plaintiffs were then "at liberty to decline to proceed further with the transaction" (Transcript of Record, p. 12). There is nothing in the Transcript of Record to indicate that, had the plaintiffs so declined, the United States would have been precluded from retaining the $13,987.30 paid and bringing a well-founded action to recover "the balance due", upon tender of delivery.

6. The letter of February 10 does not purport to vary the terms of the Appellants' offer of February 2, and even if the Appellants had declined to proceed with the transaction, as the Court below suggested they had a right to do, there is nothing in the letter of February 10 that could possibly have estopped the United States from claiming that the letter of February 10 was an acceptance of the Appellants' offer and created a contract.

C.

The Secretary of War was authorized to sell the linen in question "upon such terms as may be deemed best".

The Act of Congress of July 11, 1919, the Army Appropriation Act for the fiscal year ending June 30, 1920, provided that the Secretary of War was authorized to sell "surplus property" "upon such terms as may be deemed best". The pertinent provision of the Act, in force at the time of this transaction, reads as follows:

> "In addition to the delivery of the property heretofore authorized to be delivered to the Public Health Service, the Department of Agriculture and the Post Office Department of the Government, the Secretary of War be, and he is hereby, authorized to sell any surplus supplies including motor trucks and automobiles now owned by and in the possession of the Government for the use of the War Department to any state or municipal subdivision thereof, or to any corporation or individual upon such terms as may be deemed best."
>
> 41 Stat. L. 165, U. S. Comp. Stat., 1923 Supplement, Sec. 6941c.

Apparently this section of the Act of July 11, 1919, has not been cited by this Court except in the case of *Erie Coal & Coke Corporation* v. *United States*, 266 U. S. 518, where it was considered in another connection.

Neither the Judge Advocate General nor the Comptroller General, whose opinions appear in the Transcript of Record at pages 5 and 3, respectively, indicated any doubt as to the legality of the acceptance of the Appellants' offer, and no reference would be made to the point here except for the statement in the opinion of the Court below (Transcript of Record, p. 12) that "while it is not necessary to decide the question, it may be suggested that it probably was the only sort of an award authorized", meaning an award under the published advertisements.

D.

The inspections of the linen after Appellants' complaint of the quality show recognition of an obligation in this respect.

Finding VIII of the Court below (Transcript of Record, p. 10) refers to "several detailed inspections of the materials by experts representing both parties". The subject of these inspections was also touched upon in the opinion of the Court below as follows:

> "There is much in the record as to the various inspections which were made of the goods after being complained of by the plaintiff as to their quality, and the conclusion from such inspections, which we have not found it necessary to incorporate in the findings, since the merits of the case, as we see it, are to be determined upon another basis."
>
> *Transcript of Record*, p. 11.

The Judge Advocate General referred to one inspection of a part of the goods by the War Department as follows:

> "It appears, however, that the Air Service has caused an inspection of the remaining unbleached fabric by an expert fabric inspector who found that the linen while bought by the Government as Grade 'A' or 'firsts' quality was not in fact first quality".
>
> *Transcript of Record*, p. 6.

If the goods were sold without obligation or warranty respecting quality, it is difficult to see the purpose of the War Department in arranging, with the Appellants, these inspections by experts representing both the Government and the Appellants. Certainly where the vendee claimed a breach of warranty as to quality, the vendor could not be reasonably expected to participate in an expert determination of the question whether there had been a breach without disclaiming any responsibility as to quality, if in fact no such responsibility had been assumed.

E.

The Appellants' construction of the letters of February 2 and February 10 is in accord with the conclusions of the Judge Advocate General of the War Department and the Comptroller General.

Of course it is not intended to be suggested that the opinions of the Judge Advocate General and Comptroller General were binding in the slightest degree on the Court of Claims. Nevertheless, these opinions, it is proper to observe, sustained the view of the Appellants that the two letters in question were an offer and acceptance, creating a contract.

The Judge Advocate General said:

> "Although the advertisements of the Government did not describe the offered linen as 'firsts', but on the contrary offered the goods 'as is', expressly disclaiming a guarantee on behalf of the Government, yet the offer of Iselin & Company departed from the terms of the advertisement and was conditioned 'goods to be firsts'. This offer was unconditionally accepted by the Government's representatives and the Government thereby became obligated to deliver goods of the quality so defined, regardless of the conditions of the prior advertisement."
>
> *Transcript of Record*, pp. 6-7.

The Comptroller General said:

> "As the bid submitted was accepted unconditionally I think there can be no doubt that the Government obligated itself to furnish linen in accordance with the specifications and description given by the claimant in its bid."
>
> *Transcript of Record*, p. 4.

Moreover, the opinion of the Judge Advocate General is important in showing the construction of the terms of sale by the War Department.

F.

General rules of interpretation require the letter of February 10 to be construed, if construction be required, against the United States rather than against the Appellants, and any doubt as to its meaning should be resolved in favor of the Appellants.

Among the general rules of interpretation that may be considered in this connection are the following:

1. "The rule that a contract is to be construed most strongly against the party preparing it applies to the government in a case like this, as well as to an individual. *Garrison* v. *United States*, 7 Wall. 688, 690, 19 L. Ed. 277; *United States* v. *Newport News Shipbuilding & D. D. Co.*, 178 Fed. 194, 200, 101 C. C. A. 514; *Simpson* v. *United States*, 31 Ct. Cl. 217, 243."

Farrington, D. J., Scully v. *United States*, 197 Fed. 327, at p. 343, (1912).

In *Garrison* v. *United States* (1868), *supra*, this Court reversed the decision of the Court of Claims in the same case (2 C. Cls. R. 382) and reestablished the rule of interpretation above quoted. The summary of the argument in behalf of the claimant in the lower Court in that case reads in part as follows:

> "12. It is about time that the sacredness of contracts fairly made be vindicated, and even high public functionaries should understand (whatever their individual morality may be) that the public faith and credit cannot be capriciously trifled with" (2 C. Cls. R. at p. 383).

The Court of Claims, in unanimously dismissing the petition in Garrison's case, found that the claimant had been overpaid $1,600 or $17,800, depending upon alternative constructions of the contract.

On appeal this Court unanimously reversed the Court of Claims, "with instructions to the court below to enter a judgment for the plaintiff" for $22,400.

2. In determining the terms of a contract entered into by correspondence, a letter must be construed strictly against the party writing it.

Language used by District Judge A. N. Hand in another case would seem to be applicable:

> "The question is what the plaintiff was reasonably justified in supposing, and not what the defendant actually intended by the correspondence."
>
> *Pope* v. *Bibb*, 290 Fed. 581 at 583 (1921), *affirmed* 290 Fed. 586.

See also

13 *Corpus Juris*, 283.

The fact that the letter of February 10 was silent as to the conditions in the Appellants' offer of February 2 is sufficient, having regard to all the circumstances set out, to show acceptance of the conditions.

United States v. *Newport News Shipbuilding Co.*, 178 Fed. 194 (1910). In this case the Circuit Court of Appeals of the Fourth Circuit quoted (at p. 202) from the opinion of the Court of Claims in *Central Pacific Railway Company* v. *United States*, 28 C. Cls. R. 427, the following:

> "A construction given to a contract by the express declaration of one party, and the silent acquiescence of the other prior to or during the service of the performance, cannot be repudiated after the party has acted upon the faith of it."

POINT II.

The cases cited and apparently relied upon by the Court of Claims in holding the letter of February 10, 1920, not to be an acceptance of the Appellants' offer do not sustain the position of the Court.

Only two cases, both decisions of this Court, are cited in the opinion of the Court of Claims herein. They are cited at page 12 of the Transcript of Record, apparently for the proposition that "A proposal to accept, or an acceptance upon terms varying from those offered, is a rejection of the offer and puts an end to the negotiation, unless the party who made the original offer renews it or assents to the modifications suggested." This language is quoted by the Court below from the opinion of this Court in *Minneapolis, etc. Ry.* v. *Columbus Rolling Mill*, 119 U. S. 149, at p. 151, and may also be found in substance in this Court's opinion in *National Bank* v. *Hall*, 101 U. S. 43, at p. 50.

Before dealing with the two cases cited it should be observed that the undoubted principle stated by the Court of Claims has no application to the facts of the case now on appeal. The War Department's letter of February 10 was not "a proposal to accept, or an acceptance upon terms varying from those offered" by the Appellants in their letter of February 2. The following language from the opinion of the Court below may explain what was in the mind of that Court in the apparent treatment of the letter of February 10 as a rejection of the Appellants' offer:

> "In the communication of February 10 informing the plaintiff that it had been awarded a stated number of yards of grade A airplane linen we do not find the word 'accepted' or any word of similar import used, or any reference to plaintiff's bid."

It is submitted that this language indicates a misapprehension of the law of contracts. The important fact to be observed is not that the letter of February 10 contains no such word as "accepted" but that it does not contain a single word indicating a variation from the terms of the Appellants' letter of February 2.

However, the two cases in question, having been cited by the Court of Claims herein, will be considered in sufficient detail to distinguish them from the case before the Court on this appeal.

A. *Minneapolis & St. Louis R. R.* v. *Columbus Rolling Mill*, 119 U. S. 149 (1886):

It appeared in this case that an offer was made for the sale of "2,000 to 5,000" tons of rails. The attempted acceptance was for 1,200 tons. Obviously the order for 1,200 tons was for a quantity not within the limits of the offer, and it was held not to be an acceptance of the offer. The attempted acceptance being entirely outside the maximum and minimum limits of the offer, no further comment would seem to be required to distinguish the case from the present appeal.

B. *National Bank* v. *Hall*, 101 U. S. 43 (1879):

Obvious grounds for distinguishing this case from the case on the present appeal appear from the syllabus, 101 U. S. 43, which reads as follows:

> "A., B., & Co., a firm engaged in selling live-stock on commission, authorized a bank to cash drafts drawn on the firm by C., their agent, who forwarded live-stock to them. Some controversy arising, A., B., & Co. wrote to the bank as follows:
>
> 'Jan. 15, 1876.
>
> 'Hereafter we will pay drafts only on actual consignments. We cannot advance money a week in advance of shipment. The stock must be in transit so

as to meet dr'ft same day or the day after presented to us. This letter will cancel all previous arrangement of letters of credit in reference to C.'

The cashier of the bank replied as follows:

'Jan. 17, 1876.

'Your favor of the 15th received. I note what you say. We have never knowingly advanced any money to C. on stock to come in. Have always supposed it was in transit. After this we shall require ship'g bill.'

There was no further communication on this subject between the parties. Two clerks of A., B., & Co. who were aware of this correspondence became partners without the knowledge of the bank, and the business was thereafter carried on in the same name. C. continued to draw on the firm as before, and the bank, without requiring bills of lading, to cash the drafts, all of which were accepted and paid by the firm. The bank acted in good faith. C. absconded with the proceeds of two drafts, and the firm brought this action against the bank to recover the amount. *Held*, 1. That the letters constitute no contract, and the bank is not responsible to the firm for cashing the drafts without bills of lading attached. 2. That if, however, a contract did arise from the cashier's unanswered letter of Jan. 17, 1876, it was with the then existing firm, and ceased on the subsequent change thereof by the admission of new members, without the knowledge or the consent of the bank."

If Hall & Co. had declined to accept the drafts when presented by the bank, a very different situation would have been presented, although not one to affect the construction of Hall & Co.'s notice to the bank and the bank's acknowledgment. The effect of this notice and the bank's acknowledgment were stated by this Court in the following language:

"The defendants-in-error notified the bank that thereafter they would accept only on the conditions specified. The cashier answered, that the bank would protect itself. This is the sole effect of the letters" (101 U. S. 43, at p. 49).

POINT III.

It appears from the transcript of record that the linen delivered to the Appellants was not of "first" quality as required by the contract.

References to the quality of the goods in the Transcript of Record are very few, in consequence of the view of the Court below that no contract had been entered into. Explanation of the absence of detailed finding on this aspect of the case appear in the following language in the opinion of the Court:

> "There is much in the record as to the various inspections which were made of the goods after being complained of by the plaintiff as to their quality, and the conclusion from such inspections, which we have not found it necessary to incorporate in the findings, since the merits of the case, as we see it, are to be determined upon another basis."
>
> *Transcript of Record*, p. 11.

Again in the last paragraph of its opinion the Court said:

> "For the reasons stated and apparently without necessity of going further into the details of the transaction we have concluded that plaintiff is not entitled to recover and have directed judgment according."

However, careful consideration of Findings VIII and IX clearly shows that the linen in question "as a whole was not of first quality". Finding VIII (Transcript of Record, p. 10) reads in part:

> "By reason of this rejection upon the ground that the linen was not of first quality, complaint was made by the plaintiff to the Material Disposal and Salvage Division, as a result of which there were several detailed inspections of the materials by experts representing both parties. The defects discovered were of a minor character but they were such as to warrant the conclusion that the linen as a whole was not of first quality. It does not appear that it was not grade A."

This is to be considered in connection with Finding IX, which is as follows:

> "The term 'grade A' is a term of construction. The term 'firsts' and 'seconds' are terms of quality. The term 'grade A' was used in the trade, entirely separate and apart from the designation of quality as indicated by the terms 'firsts' and 'seconds', and if the construction of a fabric was such as to entitle it to the designation 'grade A' it was grade A, irrespective of quality."

So far as appears from the Findings of Fact, the linen may have been even below the grade of "seconds", but the only two grades of quality referred to in the Findings of Fact are "firsts" and "seconds".

POINT IV.

The measure of damage for breach of warranty of quality in a contract to sell goods is the difference between the value of the goods delivered and the goods of the warranted description and in the present case this amounts to more than the sum claimed as damages.

The general rule on this subject has been stated as follows:

> "The general measure of damage for breach of warranty of quality is the difference between the value of the article actually furnished the buyer and the value the article would have had if having the qualities which it was warranted to have. Whether the action is in tort or contract is immaterial."
>
> *Williston on Sales*, Second Edition, Sec. 613, pp. 1537-1538, and cases cited.
>
> *Florence Oil & Ref. Co.* v. *Farrar, et al.*, 119 Fed. 150 (C. C. A., Eighth Circuit, 1902).

In the present case the reasonable value of the goods of the warranted description, it is submitted, should be considered fixed at the price paid by the Appellants, namely, $134,141.60. (Finding VII, Transcript of Record, p. 10.)

The purchase price is the *prima facie* evidence of the value of the goods as warranted in the absence of other evidence.

Smeltzer v. *White*, 92 U. S. 390, at p. 395 (1875).

South Covington & C. S. Ry. Co. v. *Gest*, 34 Fed. 628 at 645 (1888).

Vaupel v. *Lamply*, 103 N. E. 796, 181 Indiana, 8 (1914).

Burgess v. *Felix*, 140 Pac. 1180, 42 Oklahoma, 193 (1914).

Denver Horse Importing Co. v. *Schafer*, 147 Pac. 367, 58 Col. 376 (1915).

In *Denver Horse Importing Co.* v. *Schafer*, *supra*, the Court said:

> "Where there is no other evidence of the real value of the article than the contract price, that is presumed to be the real value, *Seigworth* v. *Leffel*, 76 Pa. 476. The rule in *Seigworth* v. *Leffel*, *supra*, that the contract price is sufficient evidence of the value for the purpose for which the article was sold, is sustained in *Smeltzer* v. *White*, 92 U. S. 390, 23 L. Ed. 508".

As regards the difference in value between linen designated as "firsts" and linen designated as "seconds", the Court below found

> "At the time of this transaction linen of the quality designated as 'seconds' was worth, in the trade, approximately 25% less than 'firsts' ".
>
> Finding X, Transcript of Record, p. 10.

As the linen delivered was "seconds" or, so far as appears from the Findings of Fact, of poorer quality than "seconds", it was worth "25% less than 'firsts', which the Appellants

had specified, that is to say $33,536.15 *less* than the purchase price they had paid. It is submitted that this sum, $33,536.15, is the amount of the damage suffered by the Appellants as shown by the Findings of Fact. However, this amount is in excess of the damage claimed in the Appellants' Petition in the Court of Claims, in the fifth paragraph of which their damage was stated at $30,000, and the recovery of the Appellants is therefore limited to this amount.

POINT V.

The judgment appealed from should be reversed and judgment should be directed and entered in favor of the Appellants for damages in the sum alleged in the petition, namely, thirty thousand dollars ($30,000).

The Findings and Opinion of the Court below show beyond any possible doubt that the Appellants offered to buy, and thought they were to receive, only linen of first quality (Transcript of Record, pp. 9, 11-12); that in accordance with their offer they paid to the United States $134,144.60; and that the goods delivered to them were not of first quality (Transcript of Record, p. 10), but were worth 25%, or $33,536.15 less than goods of first quality (Transcript of Record, p. 10), by which amount, it follows, the Government was unjustly enriched. The facts as found show a payment for something that was never received, to wit, linen of first quality.

The attention of this Court is also invited to the omission of the Court below to make any Finding of Fact as to whether the linen delivered to the Appellants complied with

their offer in respect of other stipulations in their letter of February 2, such as the descriptive term "natural brown" and the stated average length of pieces (Transcript of Record, p. 9); and further to the omission of the Court below to make any Finding of Fact explaining the payment of $13,987.20 (Finding VI, Transcript of Record, p. 9).

Respectfully submitted,

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